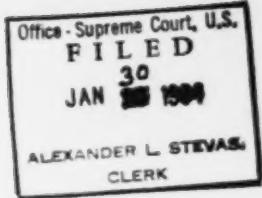


NO. 83-6048



IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

RICHARD SHERMAN WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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COUNSEL FOR RESPONDENT

January 27, 1984

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION
PURSUANT TO 28 USC §1257(3) WHERE
THE PETITIONER HAS NOT DEMONSTRATED
THE ISSUE RAISED WAS PRESENTED TO
AND DISPOSED OF BY THE COURT TO WHICH
THE PETITION IS DIRECTED.

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DECISION BELOW

Respondent accepts and incorporates the decision of the court below. Williams v. State, 438 So.2d 781 (Fla. 1983).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC §1257(3) and to the extent that a substantial federal question was properly raised by Petitioner and disposed of by the Florida Supreme Court this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The statutory provision involved, in addition to those specified in the petition, is 28 USC §1257(3), which provides:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case as set forth on pages one through three of the petition for the purpose of answering said petition. Additional facts are contained in the written opinion of the Florida Supreme Court.

REASONS FOR NOT GRANTING THE WRIT

Respondent submits that without regard to the merits of the claim presented, which it will not discuss at this time, the petition must be dismissed for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969); Street v. New York, 394 U.S. 576 (1969); and Webb v. Webb, 451 U.S. 493 (1981).

In Webb v. Webb, supra, this Court dismissed for want of jurisdiction a petition for writ of certiorari where the record failed to disclose that the federal question was presented to the Georgia Supreme Court and disposed of by that court. This

Court stated:

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

451 U.S. at 496-497.

In Cardinale v. Louisiana, supra, this Court dismissed for want of jurisdiction a petition for writ of certiorari where the sole federal question argued had never been raised, preserved, or passed upon in the state courts. This Court stated that it is vested with no jurisdiction "unless a federal question was raised and decided in the state court below." 394 U.S. at 438 (emphasis added). This Court further stated:

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or this issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 US 92, 17 L.Ed 2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them....

394 U.S. at 439.

In Street v. New York, supra, this Court stated:

...[I]n order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 USC §§1257(2), 1257(3); Bailey v. Anderson, 326 US 203, 206-207, 90 L Ed 3, 5, 6, 66 S Ct 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary....

394 U.S. at 581-582.

In the present case, the Florida Supreme Court expressly declined to consider Petitioner's claim that in refusing to grant the continuance the trial court deprived him of his right to effective assistance of counsel. 438 So.2d at 786-787. The Florida Supreme Court stated:

Here, the appellant improperly attempted to raise the question of ineffective assistance of counsel in an amended motion for a new trial. In so doing, Williams failed to provide the trial court with *sworn* to allegations necessary to prevent unfounded complaints in motions for post-conviction relief. While the trial judge received Williams' letter alleging ineffective assistance of counsel prior to sentencing and stated that defendant's argument would be preserved for further appellate review, this, in itself, does not warrant our present consideration of the issue. "[R]elief cannot be had by appeal until issues of *fact* have been first resolved in the trial court." *Pinder*, 421 So.2d at 779 (emphasis added). After thorough review of the record we find *no* evidence that the ineffective assistance of counsel allegation was sufficiently resolved so as to warrant our review. At most, defendant's letter presented "bald assertions" totally devoid of factual support. *United States v. Rodriguez*, 582 F.2d 1015 (5th Cir.1978). Moreover, neither the state nor the court-appointed trial counsels were granted the opportunity to refute the *unsworn* ineffective assistance of counsel allegation. *United States v. Prince*, 456 F.2d 1070 (5th Cir.1972); compare, *United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), cert denied, *Heinaster v. United States*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). For the above reasons, we find that Williams' claim of ineffective assistance of counsel is not, at present time, properly before this Court.

Accordingly, both the conviction and the attendant sentence are affirmed *without* prejudice to the right of Williams to raise the issue of ineffective assistance of counsel in a proper proceeding pursuant to Florida Rule of Criminal Procedure 3.850....

438 So.2d at 786-787 (emphasis in original).

The Florida Supreme Court did not reach the present claim because it was not properly raised and presented in the trial court. In other words, there is an independent and adequate state ground that pretermits a consideration of the federal claim by this Court. Thus, this Court has no jurisdiction

to consider the alleged deprivation of Petitioner's sixth amendment right to effective assistance of counsel due to the trial court's denial of a continuance of the penalty phase of Petitioner's capital trial.

CONCLUSION

Petitioner has totally failed to demonstrate that this Court has jurisdiction to entertain the petition for writ of certiorari. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted:

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to STEVEN L. BOLOTIN, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 27th day of January, 1984.

Raymond L. Marky
RAYMOND L. MARKY
OF COUNSEL.